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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MARSHALL BEARCE, Administrator of the Estate of Thomas Bearce, deceased; AETNA INSURANCE COMPANY and LESLIE PALMER, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, Marshall Bearce, Administrator of the Estate of Thomas Bearce, deceased, Aetna Insurance Company and Leslie Palmer, Jr., respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on January 4, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals reported at 614 F. 2d 556 (7th Cir. 1980) appears in the Appendix. The District Court's Findings and Conclusions dated January 30, 1979 and amended April 4, 1979 have not been reported and they appear in the Appendix. The Order denying the Petitions for Rehearing and Rehearing In Banc (6-3) is also included in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 4, 1980. A Petition for Rehearing or Rehearing In Banc was denied on March 20, 1980 by a 6-3 vote and this Petition for Certiorari was filed within ninety (90) days of March 20, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

I. Whether the "discretionary function exception" of the Federal Tort Claims Act should be implied into the Suits In Admiralty Act?

II. Whether an action against the United States based on the failure of the Government to properly light and mark a breakwater system which it created and maintained is barred by the "discretionary function exception"?

STATUTES INVOLVED

SUITS IN ADMIRALTY ACT
Title 46

§ 742. **Libel in personam** (in part)

In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States . . . .

§ 743. **Procedure in cases of libel in personam** (in part)

Such suits shall proceed and shall be heard and determined according to the principles of law and to the rules of practice obtaining in like cases between private parties. . . .

. . . .

FEDERAL TORT CLAIMS ACT
Title 28

§ 2680. **Exceptions** (in part)

The provisions of this chapter and section 1346(b) of this title shall not apply to—

> (a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. . . .

THE COAST GUARD
Title 14

§ 2. Primary duties (in part)

The Coast Guard shall enforce or assist in the enforcement of all applicable Federal laws on and under the high seas and waters subject to the jurisdiction of the United States; shall administer laws and promulgate and enforce regulations for the promotion of safety of life and property on and under the high seas and waters subject to the jurisdiction of the United States covering all matters not specifically delegated by law to some other executive department; shall develop, establish, maintain, and operate, with due regard to the requirements of national defense, aids to maritime navigation, ice-breaking facilities, and rescue facilities for the promotion of safety on, under, and over the high seas and waters subject to the jurisdiction of the United States; . . . .

§ 81. Aids to navigation authorized (in part)

In order to aid navigation and to prevent disasters, collisions, and wrecks of vessels and aircraft, the Coast Guard may establish, maintain, and operate:

(1) aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States; . . . .

§ 83. Unauthorized aids to maritime navigation; penalty

No person, or public body, or instrumentality, excluding the armed services, shall establish, erect, or maintain any aid to maritime navigation in or adjacent to the waters subject to the jurisdiction of the United States, its territories or possessions, or the Trust Territory of the Pacific Islands, or on the high seas if that person, or public body, or instrumentality is subject to the jurisdiction of the United States, without first obtaining authority to do so from the Coast Guard in accordance with applicable regulations. Whoever violates the provisions of this section or any of the regulations issued by the Secretary in accordance herewith shall be guilty of a misdemeanor and shall be fined not more than $100 for each offense. Each day during which such violation continues shall be considered as a new offense.

STATEMENT OF THE CASE

The statements of fact included in the Court of Appeals' decision and the District Court's Findings and Conclusions include most of the relevant facts. Thus, only a brief recitation of the essential facts is necessary.

At the time of his death, Thomas Bearce was attempting to navigate a power boat at night through the Oak Street Gap between the Shore Arm Extension Breakwall on his left and the Exterior Breakwall on his right in the Chicago Harbor Area of Lake Michigan. A single navigational aid was affixed to the Exterior Breakwall and no light or marking was on the Shore Arm Extension Breakwater. The only aid on the Exterior Breakwall was a green light situated atop a 55 foot tower and set back 97 feet from the end of the concrete breakwall. Thomas Bearce's boat struck the Shore Arm Extension Breakwall and Mr. Bearce died immediately as a result of the collision. The traffic through this Gap consists almost entirely of pleasure boats operated by non-professionals like Thomas Bearce.

The District Court found that the single light on the Exterior Breakwall provided no illumination for the Shore Arm Extension Breakwater (Finding 13). The court also found that the Shore Arm Extension Breakwater was difficult to see at night because it resembled a shadow or a wave (Findings 18 and 19). Therefore, the District Court specifically found that, due to the marking and lighting problems at the Oak Street Gap, the Gap was a particularly difficult area for non-professional boaters. (Finding 30). Moreover, the court found eight specific reasons to justify this finding. (Finding 30). Nevertheless, no lights or navigational aids

have ever been installed on the Shore Arm Extension Breakwater.

A series of meetings was held in 1966 at the insistence of citizens' groups to advise the Government of the dangerous condition of the Oak Street Gap. Representatives of the Coast Guard attended these meetings and were notified of the history of accidents and injuries at the breakwaters and the need for lights and markings on the Shore Arm Extension Breakwater. Then, the Coast Guard changed the color of the single light from white to green even though this change would not provide any illumination for the Shore Arm Extension Breakwater. After 1967, the Coast Guard never again reviewed the obvious need to improve the dangerous situation at the Oak Street Gap.

The District Court found that the Plaintiffs sustained $322,803.87 in damages as a result of the tragic death of Thomas Bearce, however, the Plaintiffs did not receive a judgment in this amount because the court found against the Plaintiffs on the liability issue. The Court of Appeals indicated that the trial court probably incorrectly decided the basic liability question. *See* footnote 1 of court's opinion. Nevertheless, the Court of Appeals held that the Plaintiffs were not entitled to any judgment because their cause of action was barred by the discretionary function exception.

In essence, the Plaintiffs' claim that the Government is liable in this case because it created and maintained a dangerous breakwater system and failed to remedy the hazardous situation even after it received actual notice of the problem.

REASONS FOR GRANTING THE WRIT

I.

THE UNITED STATES SUPREME COURT SHOULD RESOLVE THE CONFLICT BETWEEN THE DECISIONS OF THE FIRST AND SEVENTH CIRCUITS AND THE DECISIONS OF THE FOURTH AND FIFTH CIRCUITS ON THE QUESTION OF WHETHER THE "DISCRETIONARY FUNCTION EXCEPTION" OF THE FEDERAL TORT CLAIMS ACT SHOULD BE IMPLIED AS AN EXCEPTION TO THE SUITS IN ADMIRALTY ACT.

This case presents the important federal question of whether the "discretionary function exception" of the Federal Tort Claims Act (28 U.S.C. § 2680(a)) should be implied into the Suits in Admiralty Act (46 U.S.C. § 742 *et seq.*). In the present case and in *Gercey v. United States*, 540 F. 2d 536 (1st Cir. 1976), the Seventh and First Circuits have implied this exception into the Admiralty Act. These decisions by the First and Seventh Circuits clearly conflict with the decisions of the Fourth and Fifth Circuits in *Lane v. United States*, 529 F. 2d 175, 179 (4th Cir. 1975) and *De Bardeleban Marine Corp. v. United States*, 451 F. 2d 140, 146 & n.15 (5th Cir. 1971), which have refused to imply the "discretionary function exception" into the Suits In Admiralty Act.

The Petitioners urge this court to grant this Petition for a Writ of Certiorari and reverse the decision rendered by the Court of Appeals because the Court of Appeals' decision conflicts with the well-reasoned decisions rendered in *Lane v. United States* and *De Bardeleban Marine Corp. v. United States*; improperly amends an act of Congress without any evidence of Congressional intent; creates a conflict within the Suits

In Admiralty Act; fosters a deleterious public policy by conferring unrestricted discretion on the United States Coast Guard and the Corps of Engineers; and contradicts analogous United States Supreme Court decisions.

It is also important for this court to review this case because each and every admiralty action pending in the federal courts against the United States of America now has this question before it. Thus, this court should inform the lower courts whether the "discretionary function exception" of the Federal Tort Claims Act is part of the Suits In Admiralty Act.

II.

THE UNITED STATES SUPREME COURT SHOULD DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE DECISIONS OF THE FIRST AND SEVENTH CIRCUITS IN *GERCEY V. UNITED STATES* AND *BEARCE V. UNITED STATES* IMPROPERLY IMPLIED THE "DISCRETIONARY FUNCTION EXCEPTION" OF THE FEDERAL TORT CLAIMS ACT INTO THE SUITS IN ADMIRALTY ACT.

The opinion now at issue holds that the Petitioners have no right to recover damages from the United States pursuant to the Suits In Admiralty Act because the decision not to light or mark the Shore Arm Extension Breakwall was a discretionary function of the Coast Guard and excepted by implication from judicial review. The basic premise of the Court of Appeals' conclusion is that the discretionary function exception of the Federal Tort Claims Act is subsumed in the Suits In Admiralty Act. This judicial interpretation of the clear Congressional mandate is fallacious.

The most obvious error in the Court of Appeals' decision is its failure to appreciate that the Suits In Admiralty Act and the Federal Tort Claims Act are separate

and distinct pieces of legislation. The Federal Tort Claims Act contains an express discretionary function exception. On the other hand, the Suits In Admiralty Act omits this exception. Judge Van Dusen's opinion seems to indicate that the absence of any discretionary function exception in the Suits In Admiralty Act was merely a Congressional oversight. Nevertheless, nothing in either the express terms of the Suits In Admiralty Act or in its legislative history intimates any Congressional intent to include the discretionary function exception. Neither the legislative history nor the express terms of the Suits In Admiralty Act presented a valid reason for the Seventh Circuit to judicially amend an unambiguous act of Congress to include a very significant exception which was not adopted by the framers of the Suits In Admiralty Act and its amendments. Thus, the opinion rendered in this case should be reversed.

The analysis by the Court of Appeals in this case was also contrary to the well-established principle of legislative construction which holds that a court's judicial function is "to apply statutes on the basis of what Congress has written, not what Congress might have written". *United States v. Great Northern R. Co.*, 343 U.S. 562, 575 (1952). Since Congress could easily have placed the discretionary function exception in the Suits In Admiralty Act if it desired to have this exception applicable to admiralty cases, the failure of Congress to enact the exception either in the original text or in its amendments evidences a Congressional intent not to limit the Suits In Admiralty Act to non-discretionary negligence. In light of this legislative history, it is improper for this or any court to now judicially amend this act of Congress.

Contrary to the position adopted by the court in *Gercey*, the Fourth Circuit in *Lane v. United States* recognized that "there is no basis upon which we can import the many exceptions in the Tort Claims Act into the Suits In Admiralty Act, where the United States is to be held accountable in admiralty whenever a private person, in similar circumstances, would be". 529 F. 2d at 179. The *Lane* decision suggests that no reasonable precedent exists which permits a court to borrow an exception from one act of Congress and insert it into another Act. *Accord, Doyle v. United States*, 441 F. Supp. 701, 709 (D.S.Car. 1977) (appeal dismissed by government); *Hogge v. S.S. Yorkmar*, 434 F. Supp. 715, 732 n.3 (D. Md. 1977); *Magno v. Corros*, 439 F. Supp. 592, 599 (D.S.Car. 1977) (appeal pending); Johnson, *Liability of the United States for Maritime Torts*, 10 Univ. of Richmond L. Rev. 527, 539 (1976). Moreover, the court in *Lane* also recognized that the discretionary function exception would conflict with the Suits In Admiralty Act which holds the United States liable whenever a private person in similar circumstances would also be liable. The Petitioners urge this court to follow the rationale expressed by the Fourth Circuit in *Lane v. United States.*

III.

THE UNITED STATES SUPREME COURT SHOULD DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE DECISIONS OF THE FIRST AND SEVENTH CIRCUITS IN *GERCEY V. UNITED STATES* AND *BEARCE V. UNITED STATES* CREATE A CONFLICT WITHIN THE SUITS IN ADMIRALTY ACT.

The decision rendered by the Court of Appeals in this case conflicts with the statutory language of the Suits In Admiralty Act which provides that admiralty cases against the United States of America shall be determined according to the principles of law applicable to similar cases between private parties. 46 U.S.C. §§ 742, 743. If a private party had erected the dangerous Chicago Harbor breakwaters, and failed to properly mark them, the private party that erected the structures would clearly have been liable to the Plaintiffs in accordance with recognized tort principles. Therefore, 46 U.S.C. § 747 and § 743 dictate that the Government is similarly liable because it constructed and maintained the dangerous breakwaters which caused the death of Thomas Bearce.

The opinion rendered in this case by the Court of Appeals grafts a "discretionary function exception" onto the Suits In Admiralty Act. This judicial amendment contradicts the provisions of the Suits In Admiralty Act which extend the Government's liability to all situations in which a private party would be liable for damages. Thus, the holding by the Court of Appeals that the discretionary function exception is applicable to the Suits In Admiralty Act creates a conflict within the Suits In Admiralty Act between the discretionary function exception and the provisions of the Suits In Admiralty Act which state that the Government should be judged according to the principles of law which govern admiralty suits between private parties. The Petitioners urge this court to resolve this conflict.

IV.

THE UNITED STATES SUPREME COURT SHOULD DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE DECISIONS OF THE FIRST AND SEVENTH CIRCUITS IN *GERCEY V. UNITED STATES* AND *BEARCE V. UNITED STATES* ESTABLISH AN UNDESIRABLE PUBLIC POLICY WHICH SHOULD NOT BE APPROVED BY THIS COURT.

Even though the Suits In Admiralty Act states that the Government is to be treated as any other Defendant in an admiralty case, the Court of Appeals held that the Government is not responsible for the foreseeable result of its decision to leave an unmarked and unlit breakwater in an area heavily travelled by non-professional boaters. In effect, the court's refusal to compensate the victims who have suffered as a result of the death of Thomas Bearce is a condonation of the numerous acts of malfeasance by the Coast Guard and the Corps of Engineers. Moreover, this case now stands for the untenable proposition that the United States of America can build any type of breakwater at any place without any lights and be immune from responsibility for the deaths and maimings which result from collisions with the breakwaters. It is not good public policy for this court to allow the Government to erect a structure which resembles a wave, and then, after someone mistakes it for a wave and is killed, hold that the Government was not responsible for the resulting tragedy. This court should not adopt this policy and establish this dangerous precedent.

It was the grossest kind of negligence to erect an unlit and unmarked concrete breakwater in a waterway used by amateurs. Thus, the opinion of the Court of Appeals which would impose liability for simple negligence, e.g., an inoperable light, and not impose liability for gross negligence is improper. For obvious policy reasons, it is

wrong to penalize the Coast Guard for placing a light to warn citizens of dangers while rewarding the Coast Guard for doing nothing. Nevertheless, this contradiction results from the opinion of the Court of Appeals in this proceeding.

V.

THE UNITED STATES SUPREME COURT SHOULD DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE DECISIONS OF THE FIRST AND SEVENTH CIRCUITS IN *GERCEY V. UNITED STATES* AND *BEARCE V. UNITED STATES* CONFLICT WITH THE RATIONALE EXPRESSED BY THIS COURT IN *MORAGNE V. STATES MARINE LINE* AND *SEA-LAND SERVICES V. GAUDET.*

This court in *Moragne v. States Marine Line*, 398 U.S. 375 (1969) and *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1973) has had the opportunity to carefully review the policy considerations which govern admiralty actions. In *Sea-Land Services v. Gaudet*, this court recognized the admiralty court's historical "special solicitude" for the dependents of the seafaring decedent. 414 U.S. at 577. In *Moragne v. States Marine Line*, this Court specifically noted that "where death is caused by the breach of a duty imposed by federal maritime law, Congress has established a policy favoring recovery in the absence of a legislative direction to except a particular class of cases". 398 U.S. at 393. Thus, the *Moragne* opinion seems to indicate that a recovery is proper in this case because the death of Mr. Bearce resulted from the failure of the United States Coast Guard to properly "develop, establish, maintain and operate . . . aids to maritime navigation . . . for the promotion of safety on . . . waters subject to the jurisdiction of the United States. . . ." as required by 14 U.S.C. § 2 and there has been no legislative direction to except this class of case.

The previous decisions rendered in this case limit rather than expand the admiralty remedies available to the next of kin of persons killed at sea because these decisions bar any cause of action resulting from negligent but discretionary actions by agents of the United States. Therefore, the holdings in this case are contrary to the rationale of the *Moragne v. States Marine Line* and *Sea-Land Services v. Gaudet* decisions.

VI.

THE UNITED STATES SUPREME COURT SHOULD DECIDE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE DECISION RENDERED IN THIS CASE MISCONSTRUES AND MISAPPLIES THE DECISION OF THE SUPREME COURT IN *INDIAN TOWING CO. V. UNITED STATES*.

The present case involves an important federal question even if the court decides against the Petitioners on the primary issue raised in this Petition. If this court agrees with the First and Seventh Circuits and holds the discretionary function exception applicable to this case, it will be important for this court to also define this exception with substantial clarity because the exception will become an issue in every Suits In Admiralty Act case against the United States. Thus, the District Court judges and the practicing bar will need to know the scope of the discretionary function exception in admiralty situations.

The Court of Appeals and the parties to this suit have all relied on the decision in *Indian Towing Co. v. United States*, 350 U.S. 61 (1955) and any analysis of the discretionary function exception should start with the *Indian Towing* opinion. The Petitioners contend that the holding in *Indian Towing* supports their position because the Goverment in this case built and maintained the

breakwater system in the Chicago Harbor and exercised its discretion by creating this pleasure boating area. The Court of Appeals did not accept the Petitioners' argument on this issue.

The Court of Appeals' narrow reading of the United States Supreme Court decision in *Indian Towing Co. v. United States*, misconstrues and misapplies the *Indian Towing* case. Moreover, the court's analysis of *Indian Towing* constitutes an unsound judicial precedent. According to Judge Van Dusen's interpretation of *Indian Towing*, the Government is not liable to the Bearce Estate because it never placed a light on the Shore Arm Extension Breakwater. On the other hand, the court cited *Somerset Seafood Co. v. United States*, 193 F. 2d 631, 635 (4th Cir. 1951) for the proposition that the Government would have been liable if it had placed a light on the breakwater and the light was inoperable on the day of the accident. This distinction does not make sense when applied to the facts of this case.

In *Indian Towing Co. v. United States*, Justice Frankfurter clearly explained the legal principles applicable to this case and stated that "it is hornbook tort law that one who undertakes to warn the public of danger and thereby induces reliance must perform his 'good samaritan' task in a careful manner". *Id.* at 64-65. Then, this Court in *Indian Towing* held that the United States was liable to a shipowner for damages suffered when its ship was grounded because a lighthouse light was inoperable. The present case deserves the same result as the *Indian Towing* decision. In the case at bar, the United States installed a navigational aid for the Oak Street Gap in 1890 (Finding 14); erected the Shore Arm Extension Breakwater in 1917 (Finding 5); increased the breakwater's height in 1965 (Finding 6); and

never placed an aid or light on this breakwater (Finding 7). Thus, the United States exercised its discretion by choosing to erect the breakwaters to create an area for use by pleasure boaters. In addition, the Government also decided to establish a navigational aid system to mark the Oak Street Gap. Because the United States clearly undertook to protect boaters and "warn the public of danger" within the meaning of *Indian Towing*, it should be liable for its negligence and malfeasance.

Indian Towing Co. v. United States teaches that the Corps of Engineers owed Thomas Bearce a duty to exercise due care in the design and building of the Shore Arm Extension Breakwater. Once the Corps chose to erect the Oak Street Gap Breakwater System, it was required to perform this task in a reasonably safe manner. In addition, the Coast Guard owed the Petitioners a duty to exercise due care in its design of the marking system at the Oak Street Gap. Because the Coast Guard chose to undertake to mark the mariner's course, it was required to mark the Gap in a manner which would alert pleasure boaters to the dangers in the area. The Government failed to meet its obligations in this case and, therefore, it should be liable for its negligence. Thus, the Petitioners urge this court to reaffirm the principles stated in *Indian Towing Co. v. United States* and reject the Court of Appeals' holding in this case on this question.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Consolidated Cases
Nos. 76 C 1163 and 77 C 1628

MARSHALL BEARCE, Administrator of the Estate of Thomas Bearce, deceased; AETNA INSURANCE COMPANY and LESLIE PALMER, JR.,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, and ITS SUBORDINATE AGENCIES, THE UNITED STATES COAST GUARD and THE UNITED STATES CORPS OF ENGINEERS,

Defendants.

Before the Honorable George N. Leighton
United States District Judge

Findings and Conclusions

I. Findings of Fact

1. On May 10, 1975, Lake Michigan and the Chicago Harbor were navigable waters of the United States of America.

2. For a long time prior thereto, Lake Michigan, the Chicago Harbor, the Oak Street Gap and the Shore Arm Extension were all under the jurisdiction of the United States Coast Guard.

3. Commercial shipping regularly occurs in Lake Michigan and in the Chicago Harbor area of the lake

and it has occurred regularly in these areas between 1889 and the present.

4. On May 10, 1975, the United States owned and maintained all the breakwaters situated in the Chicago Harbor with the exception of the 97 westernmost feet of the Exterior Breakwater. These structures were built and improved by the United States Army Corps of Engineers at various times.

5. The breakwater referred to in this litigation as the "Shore Arm Extension" or "Oak Street Extension" was originally constructed at about 1917; and its height was increased to 7.0 feet above Lake Michigan datum in 1965.

6. In 1965, the United States Army Corps of Engineers constructed a concrete parapet on top of the "Shore Arm Extension" Breakwater; and it was this parapet that was struck by the front of deceased's boat on May 10, 1975.

7. No lights or navigational aids were ever installed or constructed on the Shore Arm Extension Breakwater.

8. The concrete parapet constructed in 1965 on the Shore Arm Extension Breakwater by the United States Army Corps of Engineers had a base width of 6 feet and a height of 3.5 feet above previously constructed crib and it rose approximately 3.5 feet from the water level of Lake Michigan.

9. The breakwater referred to in this litigation as the Exterior Breakwater was constructed in 1889; and in 1928, it was increased in height to 7.1 feet above Lake Michigan datum. In May, 1975, it projected approximately 3.7 feet above the water level of Lake Michigan.

10. The Oak Street Gap is the channel between the Shore Arm Extension Breakwater and the Exterior Breakwater with the Shore Arm Extension Breakwater to the west of the Gap and the Exterior Breakwater to the east.

11. On May 10, 1975, a fixed aid to navigation, was situated atop the Exterior Breakwater at a point 97 feet from the west end of the breakwater.

12. The aid to navigation was a 4 second flashing green light mounted upon a 55 foot white skeletal steel tower and known as the Outer Breakwater N.W. End Light (LL # 2211).

13. The navigational aid located on the Exterior Breakwater provided no illumination for the Shore Arm Extension Breakwater or the Oak Street Gap on May 10, 1975.

14. The aid to navigation mounted atop the western end of the Exterior Breakwater was placed there by the United States in 1890.

15. Prior to February, 1967, the aid to navigation on the Exterior Breakwater had a white light. In February, 1967, the United States Coast Guard changed it to a four second flashing green light. This aid to navigation was in operation on May 10, 1975, was in good working order, and functioning as designed.

16. The Oak Street Gap between the Shore Arm Extension Breakwater and the Exterior Breakwater has been used primarily by small boats and vessels.

17. The traffic through the Oak Street Gap consists almost entirely of pleasure boats operated by non-professionals.

18. Under certain conditions, the Shore Arm Extension Breakwater blends in with the water at night. On a very dark night, the Shore Arm Extension Breakwater would be just a difference in shade from the water.

19. When travelling in a northerly direction, the Shore Arm Extension Breakwater is difficult to see at night. On an average night, it resembles a shadow or a wave. On a night with the best possible natural lighting, the Shore Arm Extension Breakwater would look like a shadow to a mariner travelling in a northerly direction.

20. On May 10, 1975, at approximately 9:55 p.m., Central Standard Time, Thomas Bearce, while operating a white 19'7" fiberglass boat named "For the Good Times" powered by a 233 h.p. engine, travelling at a high rate of speed when he collided with the aforementioned "Shore Arm Extension" approximately 20 feet from the end nearest the Oak Street Gap. One passenger, Gary Carlstrand, was in the boat with Mr. Bearce. As a result of the collision, Thomas Bearce was instantly killed; and Gary Carlstrand was seriously injured when the impact of the boat with the extension threw him into the water. The collision occurred at night. Sunset had occurred at 7:58 p.m. At the time and place of the collision, the weather was clear with wind from the north at 10 m.p.h., and the sea was calm.

21. At the time of the collision, the decedent was travelling in a generally northerly direction and was proceeding through the Oak Street Gap with the Shore Arm Extension Breakwater on his left (west) and the Exterior Breakwater on his right (east).

22. Thomas Bearce was proceeding through the Oak Street Gap in a northerly direction on a route roughly parallel to the Exterior Breakwater and behind a boat operated by Bruce Krumholz. At the point when Bearce was about to pass the green flashing aid on the Exterior Breakwater, he changed direction, crossed the wake of the Krumholz boat and began proceeding to the west. He did not lessen the speed of the boat he was piloting before its impact with the Shore Arm Extension.

23. The witnesses who saw the impact of the Bearce boat with the Shore Arm Extension Breakwater were situated approximately in the middle of the Oak Street Gap at a point approximately 200 feet from the impact. Two of them could only see the white hull of the Bearce boat and its lights explode on impact. From their point of vision, they could not see the Shore Arm Extension Breakwater. One witness claimed seeing something that resembled a low barge; another could see only a glimpse of the breakwater struck by Thomas Bearce.

24. The boat operated by Thomas Bearce on May 10, 1975, was only two days old and it was in perfect operating condition.

25. Thomas Bearce was an experienced small boat operator who was able to negotiate through and around obstacles. He was also familiar with the Oak Street Gap and well-able to navigate through it. Thomas Bearce had gone through this gap on a number of occasions.

26. The boat he was operating at the time of his death was capable of travelling at speeds up to 45-50 miles per hour. At speeds below 15-20 miles per hour, the front end of the boat rode so high in the water that it obscured the vision of the boat operator. At speeds over 15-20 miles per hour, the front end of the boat was lower than at lesser speeds; it rode on a plane and its frontal vision was not obscured. This type of boat is common in the Oak Street Gap area of the Chicago Harbor.

27. There was no speed limit in effect in the Chicago Harbor at the area of the subject collision on May 10, 1975.

28. After an investigation of the facts surrounding the death of Thomas Bearce, Coast Guard Lt. L. H. Walter, on January 13, 1976, prepared a report for the United States Coast Guard as part of his regular duties as a Coast Guard Officer, and pursuant to orders from his superiors.

29. At the trial of this case, he testified that operation of a boat at a high rate of speed in open water with no one around would be quite impossible under federal law and Coast Guard regulations; but operating a boat at a high rate of speed after dark would be considered negligent, and would in fact be a violation of regulations.

30. The Oak Street Gap is a particularly difficult area for non-professional boaters for a number of reasons:

a. The only navigational aid in the area is located 97 feet from the edge of the Gap instead of at the end of the opening.

b. The Shore Arm Extension Breakwater which borders the Gap immediately to the west has no lights or markings on it.

c. The Shore Arm Extension Breakwater resembles a shadow or a wave at night except on some nights when it is impossible to see.

d. Pilings are located to the east of the Shore Arm Extension Breakwater; and no lights, markings or buoys mark their presence in the area.

e. A mariner travelling in a southerly direction has difficulty seeing the Gap and the adjacent breakwaters because of the Filtration Plant lights.

f. A mariner travelling in a northerly direction has to contend with the lights along Lake Shore Drive which affect the mariner's visibility.

g. The breakwaters are set at an obtuse angle which make them difficult to judge.

h. A mariner in Thomas Bearce's position on the night in question, and who attempts to travel through the Gap in a northerly direction on a route roughly parallel to the Exterior Breakwater must be extremely careful to avoid striking the 97 feet of concrete which extend beyond the green light. Moreover, he must avoid steering his boat so close to the Exterior Breakwater that he might strike it. In addition, a mariner must not stray too far from the Exterior Breakwater if driving parallel to this breakwater because this route will run the boater directly into the Shore Arm Extension Breakwater.

31. The Chicago Harbor Navigational Aid system is designed by the United States Coast Guard for the boater who is informed on the use of navigational aids, charts, pilots and light lists. The system is not designed for the boater who is not informed in the use of navigational aids, charts, pilots and light lists.

32. Approximately November, 1966, a number of citizen groups initiated a series of meetings to review the dangerous condition that existed in the Chicago Har-

bor near the Oak Street Gap. The following persons and organizations either attended or were represented:

1. Joseph V. Day, Illinois Boating Council (Chairman);
2. John Natwig, Coast Guard Commander, Chicago Group;
3. Gordon D. Hall, Chief of Aids To Navigation Branch of the Ninth Coast Guard District;
4. Kenneth Grunewald of the Illinois Department of Conservation;
5. Edward Stein, Commodore of the Columbia Yacht Club;
6. Chicago Police Department;
7. Lt. Wertz of the Chicago Fire Department.
8. Yacht Club representatives;
9. John Trinka, representative of the Chicago Park District;
10. Peter Contos, City of Chicago electrical engineer;
11. Frank Hayes, Local yachting writer;
12. Attorney for the Walgreen family;
13. Mr. Boden of the Corps of Engineers.

33. A United States Coast Guard representative was in attendance at each meeting. A problem that precipitated the meeting was the difficulty encountered by southbound mariners travelling through the Oak Street Gap who were unable to see because of the bright lights from the filtration plant. Another was the fact that there were no lights on the sides of the Oak Street Gap or on either end of the Shore Arm Extension Breakwater.

34. Accidents had occurred prior to the meetings of late 1966, at both the Exterior Breakwater and the Shore Arm Extension Breakwater. These accidents were a cause of the concern to some of the persons who attended the meetings.

35. Coast Guard Captain Natwig indicated at one of the meetings that he agreed that there should be better navigational lighting on the Shore Arm Extension as well as the Exterior Breakwaters.

36. Referring to the problems which precipitated the meetings of November, 1966, Coast Guard Commander Natwig stated the following in his memorandum of November 15, 1966, to the Commander of the Ninth Coast Guard District:

> 3. A solution to the problem would be to convert the Chicago Outer Breakwater Northwest End Light (LL 2702) to a green light and establish a new aid showing a red light, of appropriate characteristic, on the outer end of the Shore Arm Extension Breakwater. This would distinguish the entire breakwater opening commonly known as "Oak Street Gap".

37. At the time of the recommendation by John Natwig, he was the Commander of the Chicago Group and the highest ranking United States Coast Guard officer in the Chicago Area.

38. Gordon Hall, acting Chief of the Aids to Navigation Branch of the Ninth Coast Guard District observed the Oak Street Gap at night on November 18, 1966 and later attended one of the citizens' meetings. On this occasion, he observed that the Chicago Harbor breakwaters were "difficult to distinguish because of lack of depth perception" except in the immediate vicinity of each light. He also concluded that it "is not difficult to see how the inattentive or inexperienced boater can find himself in sudden trouble in the area proximate to the breakwater".

39. Referring to the report of Gordon D. Hall, Captain Robert Waldron, Chief of Staff, Ninth Coast Guard District, United States Coast Guard and second senior officer in the District stated as follows:

> 2. I personally believe the answer to this problem is floodlighting by the city. Could be expensive but is worthwhile.

40. The United States Coast Guard keeps its navigational aid records by maintaining a file on each aid. No file exists for the Shore Arm Extension Breakwater since no aid is present on the breakwater.

The only file for the Oak Street Gap is the file for the existing navigational aid on the Exterior Breakwater.

41. The United States Coast Guard has no records showing the type and amount of traffic through the Oak Street Gap or the speeds customarily travelled by boats through the gap.

42. The United States Coast Guard has no records of any accidents near the Oak Street Gap since the meetings of 1966-1967.

43. The only time the lighting and marking situation at the Oak Street Gap was reviewed by the United States Coast Guard was in 1966-67 at the insistence of the Chicago boating public. It was a review of the navigational aid and lighting situation for the Shore Arm Extension Breakwater and the Exterior Breakwater.

44. The 1966-67 review of the navigational aid and lighting situation in the Chicago Harbor was the last instance when the United States Coast Guard reviewed or studied the navigational aid and lighting situation at and near the location of the accident in this case.

45. Since 1967, neither the Coast Guard nor any other agency of the United States Government has altered the characteristics of the navigational aid existing on the westernmost end of the Exterior Breakwater in the Chicago Harbor. And since February, 1967, neither the Coast Guard nor any other agency of the United States Government has taken any steps to alter the navigational aid and lighting situation for the gap between the Shore Arm Extension and the Exterior Breakwater in the Chicago Harbor.

46. United States Coast Guard personnel are stationed in the Chicagoland and Lake Michigan Areas and have been stationed in these areas for a long time prior to May 10, 1975.

47. The United States Coast Guard does not require any training of, nor require the use of charts, pilots or light lists by pilots of pleasure boats travelling in Lake

Michigan, although it is within the authority and jurisdiction of the Coast Guard to impose these requirements if deemed necessary for safety purposes.

48. At the time of the occurrence described in the Plaintiffs' Complaint, the boat operated by Thomas Bearce was owned by the Plaintiff, Leslie Palmer, Jr., who had a policy of insurance on the boat with the Plaintiff, Aetna Insurance Company (Policy No. 61-18-33). The insurance policy between Aetna and Palmer had the following provision:

> 6. Subrogation. In the event of any payment under this policy the Company shall be subrogated to all the Insured's rights of recovery therefor against any person or organization, and the Insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The Insured shall do nothing after loss to prejudice such rights.

49. As a direct and proximate result of the collision described in the Plaintiffs' Complaint, the boat operated by Thomas Bearce, owned by Leslie Palmer, Jr., and insured by Aetna Insurance Company was damaged.

50. Thereafter, Leslie Palmer, Jr., made a claim for his damages against Aetna Insurance Company and Aetna Insurance Company was required to pay him $6,700 pursuant to the terms of the insurance contract.

51. In addition to the monies paid to its insured, Plaintiff Aetna Insurance Company was also required to pay $100.00 as a storage cost for the damaged boat. Aetna received a payment of $52.00 upon sale of the boat as salvage.

52. Thomas Bearce was one of two children born to Marshall and Nancy Bearce and living on May 10, 1975. He continually resided at his parents' home after his release from the United States Air Force in 1966. He saw his parents daily. His sister, Cinda Bousman, had married and left the home of her parents' and brother before Tom's death. Thomas Bearce was a good, kind and loving son and brother. He was born on December

4, 1944. On May 10, 1975, Thomas Bearce was 30.4 years of age and his work-life expectancy on his date of death was 31.9 years.

53. Marshall Bearce, father of Thomas Bearce, was born on September 7, 1916. On May 10, 1975, he was 58.7 years of age and his life expectancy on May 10, 1975 was 17.0 years. Nancy Bearce, mother of Thomas Bearce, was born on March 6, 1921. On May 10, 1975, she was 54.2 of age and her life expectancy on May 10, 1975 was 25.5 years.

54. Thomas Bearce paid $90.00 each month to his parents for room and board. This amount had increased over the years as Tom's wages had increased and prices had risen.

55. Thomas Bearce worked approximately 3.5 hours per week for his parents at their home. His services included carrying garbage, shoveling snow, cleaning and repairing cars, cutting and caring for the lawn and other miscellaneous household tasks.

56. Thomas Bearce was steadily employed from the date of his release from the United States Air Force in 1966 until his death in 1975. He had a high school diploma. He had worked 1,312.65 hours for Bonji Cartage Company as a construction semi-truck driver and was a member of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 731 during the year preceeding his death.

57. The gross income of Thomas Bearce for the years 1971-1975 was

1971	$12,707.00
1972	13,437.00
1973	13,518.00
1974	11,613.00
1975	3,636.00

and the average annual gross income of Thomas Bearce for the years 1971, 1972, 1973 and 1974 was $12,818.75.

58. The average rate of increase in the rate of pay for construction semi-truck drivers who were members of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers, Local 731, between January 1, 1972 and July 1, 1978 was 7.6% per year. During this period, the rate had increased from $6.05 per hour to $9.75 per hour. The projected rate of inflation for the lifetimes of the parents of Thomas Bearce is 6% per year.

59. As a direct and proximate result of the death of Thomas Bearce in the collision of May 10, 1975, the Estate of Thomas Bearce was required to pay $974.87 for funeral services to Ryan-Park Funeral Home.

60. The Estate of Thomas Bearce also has incurred the following costs for Administration of this Estate:

Clerk of Circuit Court (Docket Fee)	$12.00
Clerk of Circuit Court (Copies of letters)	4.00
Coroner's Office (Inquest fee)	30.00
Weinstein & Ryan (surety bond)	10.00
Official Reporting Service (Proof of heirship)	14.00
	$70.00

61. If Marshall and Nancy Bearce are entitled to judgment in this case, they should be compensated for

	$80.00	Net loss of support payments from Thomas Bearce
x	12	months per year
x	17.0	life expectancy of Marshall Bearce
x	6%	projected rate of inflation
	$28,709.00	Total amount of support lost by Marshall and Nancy Bearce until the death of Marshall Bearce

62. If Nancy Bearce is entitled to judgment, she should be further compensated for the loss of financial support regularly expected to be paid to her after the projected date of death of Marshall Bearce until her death using the following formula:

	$80.00	Net loss of support payments from Thomas Bearce
x	12	months per year
x	25.5	life expectancy of Nancy Bearce
x	6%	projected rate of inflation
	$58,014.00	Total amount of support lost using the inflation increase
-	28,709.00	support lost from May 10, 1975 to date of projected death of Marshall Bearce using inflation increase
	$29,305.00	Additional support lost by Nancy Bearce after projected death of Marshall Bearce

63. If Marshall and Nancy Bearce are entitled to judgment, they should be compensated for the loss of services reasonably expected to be rendered by Thomas Bearce from May 10, 1975, to the date of the projected death of Marshall Bearce using the following formula:

	$2.00	minimum wage on May 10, 1975
x	3.5	hours worked per week by Thomas Bearce
x	52	weeks per year
x	17.0	life expectancy of Marshall Bearce
x	6%	projected rate of inflation
	$10,886.00	Total amount of services expected to be rendered to Marshall and Nancy Bearce until the date of death of Marshall Bearce

64. If Nancy Bearce is entitled judgment, she should be compensated for the loss of services reasonably expected to be rendered by Thomas Bearce from the date of the projected death of her husband, Marshall Bearce, to the date of her projected death using the following formula:

	$2.00	minimum wage on May 10, 1975
x	3.5	hours worked per week by Thomas Bearce
x	52	weeks per year
x	25.5	life expectancy of Nancy Bearce
x	6%	projected rate of inflation
	$21,997.00	Total amount of services rendered using projected inflation rate
-	$10,886.00	Services rendered from May 10, 1975 to date of projected death of Mr. Marshall Bearce
	$11,111.00	Loss of expected services to Mrs. Nancy Bearce after death of Mr. Marshall Bearce.

65. Tom and his father regularly enjoyed sporting events together. They also enjoyed conversation, family dinners and parties. Their relationship was very close. Thomas Bearce was Marshall Bearce's only son and oldest child. Marshall Bearce still misses his son.

66. Tom also had a very affectionate relationship with his mother. He organized her fiftieth birthday party and always remembered her with cards and gifts on Mother's Day, Valentine's Day, Sweetest Day and her birthday. She had a very difficult time adjusting to his death. After the tragedy, she was unable to smile or laugh for a very long time. Based on her life expectancy, Mrs. Bearce now will probably have to live a widow's life for 8.5 years without the benefit of the presence of her son.

Tom saw his sister, Cinda, approximately twice a week for the six months before his death. They remained very close even though she was married and living away from home. Thomas helped her at her home because her husband was terminally ill. He also regularly gave her gifts and money and comforted her during her time of sorrow. She found it difficult to accept the death of her brother.

67. If plaintiffs are entitled to judgment, they would be to the following awards for damages suffered as a result of the incident of May 10, 1976:

1.	Aetna Insurance Co.	$ 6,748.00
2.	Estate of Thomas Bearce (funeral expenses)	974.87
3.	Estate of Thomas Bearce (administrative expenses)	70.00
4.	Loss of Support to Marshall and Nancy Bearce	28,709.00
5.	Loss of Support to Nancy Bearce	29,305.00
6.	Loss of services to Marshall and Nancy Bearce	10,886.00
7.	Loss of services to Nancy Bearce	11,111.00
8.	Loss of society to Marshall Bearce for his remaining 17 years	85,000.00
9.	Loss of society to Nancy Bearce for her remaining 25.5 years (8.5 as widow)	125,000.00
10.	Loss of society, services and support to Cinda Bousman	25,000.00

II. Conclusions of Law

From these facts, this court reaches the following conclusions of law.

1. The court has jurisdiction over the parties and over the subject matter of this controversy pursuant to the Suits in Admiralty Act, 46 U.S.C. § 471, *et seq.* There is no occasion for it to decide whether the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671, *et seq.*, is applicable to this case.

2. The United States owed no duty to plaintiffs or to the public in general to establish an aid to navigation at any particular place or to establish a particular type of aid at any given location. The establishment and placement of aids to navigation is a discretionary function vested in the United States Coast Guard by Congress. 14 U.S.C. § 81; *Gercey v. United States*, 540 F.2d 536 (1st Cir. 1976), *cert. denied*, 430 U.S. 954 (1977).

3. The plenary power of the United States in the navigable waters of the country is firmly established. Accordingly, neither plaintiffs nor any member of the public can be heard to complain of the existence, location or method of construction of the Shore Arm Extension or what in this case has been referred to as the Oak Street Gap. Furthermore, plaintiff's decedent, Thomas Bearce, because of his long familiarity with the Lake Michigan in and around the Chicago Harbor had knowledge of the existence of the Shore Arm Extension and the Oak Street Gap so that any question he might have had concerning these structures, their location and size could have been readily answered for him in publications the United States makes available to the public at nominal cost.

4. The location of the 400 foot opening between the Shore Arm Extension and the Oak Street Gap is a hazard apparent to any mariner seeking to negotiate passage through it at night; and on the occasion when Thomas Bearce met his death, the four second flashing green light, an aid to navigation located atop the western

end of the Exterior Breakwater, was properly located, charted and functioning. Its purpose as an aid to navigation on the night of May 10, 1975 was to guide a prudent mariner piloting any boat so that by bearing to the starboard, toward the aid to navigation, passage through the opening could be safely negotiated.

5. Under the circumstances shown by the evidence in this case, the United States breached no legal duty to any of the plaintiffs. Acting through the United States Coast Guard, it had furnished an adequate, properly charted, designed and functioning aid to navigation which any prudent mariner could have utilized to negotiate the Oak Street Gap at night providing the boat was operated at a safe speed, with the pilot cognizant of the inherent dangers presented by the Oak Street Gap complicated by darkness and other environmental factors.

6. As in all cases of this kind, plaintiffs have the burden of proving, consistent with their theory, that absence of the aid to navigation they contend should have been furnished by the United States Coast Guard proximately caused the accident that brought about Thomas Bearce's death. Plaintiffs have not carried their burden of proof.

7. The sole proximate cause of the accident that brought about the death of Thomas Bearce on May 10, 1975, at approximately 9:55 p.m., Central Standard Time, was his negligent operation of the motor boat he was piloting approaching the opening of the Oak Street Gap travelling at a high rate of speed, a fact shown by his having been instantly killed when the motor boat he was piloting collided with the Shore Arm Extension. This conclusion is dictated by the fact that Gary Carlstrand, Bearce's companion at the time, was thrown into the water by the impact of the boat with the extension.

8. These conclusions dictate that judgment be entered in favor of defendant United States and that the complaints of Marshall Bearce as Administrator of the

Estate of Thomas Bearce, deceased, Aetna Insurance Company, and that of Leslie Palmer, Jr., be dismissed with prejudice and costs.

So ordered

/s/ George N. Leighton, United States District Judge

Dated: January 30, 1979

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Consolidated Cases
Nos. 76 C 1163 and 77 C 1628

MARSHALL BEARCE, Administrator of the Estate of Thomas Bearce deceased; AETNA INSURANCE COMPANY and LESLIE PALMER, JR.,

Plaintiffs,

vs.

THE UNITED STATES OF AMERICA, and ITS SUBORDINATE AGENCIES, THE UNITED STATES COAST GUARD and THE UNITED STATES CORPS OF ENGINEERS,

Defendants.

Before the Honorable George N. Leighton
United States District Judge

Order

This cause comes before the court on plaintiffs' motion to amend the judgment entered herein on January 30, 1979, pursuant to Rule 52(b), Fed.R.Civ.P. The court having reviewed the record, the motion is granted in part and denied in part;

Finding of Fact No. 20 is hereby amended to read:

> On May 10, 1975, at approximately 9:55 p.m., Central Standard Time, Thomas Bearce, while operating a white 19'7" fiberglass boat named "For the Good Times" powered by a 233 h.p. engine, was

travelling at a high rate of speed when he collided with the aforementioned "Shore Arm Extension" approximately 20 feet from the end nearest the Oak Street Gap. One passenger, Gary Carlstrand, was in the boat with Mr. Bearce. As a result of the collision, Gary Carlstrand was seriously injured; and Thomas Bearce was instantly killed when the impact of the boat with the extension tore the engine from its mounting in the stern of the boat and hurled it forward where it struck Bearce. The collision occurred at night. Sunset had occurred at 7:58 p.m. At the time and place of the collision, the weather was clear with wind from the north at 10 m.p.h., and the sea was calm.

Conclusion of Law No. 7 is hereby amended to read:

The sole proximate cause of the accident that brought about the death of Thomas Bearce on May 10, 1975, at approximately 9:55 p.m., Central Standard Time, was his negligent operation of the motor boat he was piloting approaching the opening of the Oak Street Gap travelling at a high rate of speed, a fact shown by his having been instantly killed when the motor boat he was piloting collided with the Shore Arm Extension. This conclusion is dictated by the fact that the boat's engine was torn from its mounting in the stern of the boat by the impact and hurled forward where it struck Bearce.

Plaintiffs' motion to amend judgment is granted as to Finding of Fact No. 20 and Conclusion of Law No. 7, and denied in all other respects.

So ordered

/s/ George N. Leighton, United States District Judge

Dated: April 4, 1979

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 79-1512

MARSHALL BEARCE, Administrator of the Estate of Thomas Bearce, Deceased; AETNA INSURANCE COMPANY and LESLIE PALMER, JR.,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA and its Subordinate Agencies, THE UNITED STATES COAST GUARD and THE UNITED STATES CORPS OF ENGINEERS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
Nos. 76-C-1163 & 77-C-1628—**George N. Leighton**, *Judge.*

ARGUED OCTOBER 23, 1979—DECIDED JANUARY 4, 1980

Before FAIRCHILD, *Chief Judge,* BAUER, *Circuit Judge,* and VAN DUSEN, *Senior Circuit Judge.**

VAN DUSEN, *Senior Circuit Judge.* This appeal attacks an April 4, 1979, district court judgment, in favor of the defendant (the United States), on plaintiffs' claim alleging violation of the Suits in Admiralty Act, 46

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* The Honorable Francis L. Van Dusen, Senior Circuit Judge of the United States Court of Appeals for the Third Circuit, sitting by designation.

U.S.C. § 742, *et seq.* We affirm the district court's judgment on the ground that the alleged wrongful acts of the Government are not reviewable by a court because these acts are included under an implied "discretionary function" exception to the Federal Government's waiver of sovereign immunity under the Suits in Admiralty Act.[1]

On the night of May 10, 1975, Thomas Bearce was operating a new, 20-foot, fiberglass speedboat with a 233 h.p. engine in the Chicago harbor on Lake Michigan. The harbor is made out of a series of breakwaters. It has an exterior breakwater which runs roughly parallel to the shore. Ninety-seven feet from the north end of the exterior breakwater there is a four-second flashing green light maintained by the Coast Guard as an aid to navigation. Extending out perpendicular to the shore is another breakwater, the Shore Arm Extension breakwater. Both breakwaters were constructed before 1920; however, a parapet was added to the Shore Arm Extension in 1965, which made this breakwater extend 3.5 feet above the water. The eastern end of the Shore Arm Extension is 400 feet from the northern end of the exterior breakwater. There has never been a light on the Shore Arm Extension, so the 400-foot gap between the two breakwaters has only one light to assist passage at night. This opening is a secondary entrance to the Chicago harbor and is rarely used by commercial vessels. The main entrance has two lights and other navigational aids.

Bearce was an experienced power boat operator who was familiar with the Chicago harbor. He had passed through the gap earlier that day. The district court found that at approximately 10:00 p.m. on the night of May 10, 1975, he was following another boat out of the

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[1] We do not agree with the district court opinion's statement that "the sole proximate cause of the accident that brought about the death of Thomas Bearce on May 10, 1975, at approximately 9:55 p.m., Central Standard Time, was his negligent operation of the motor boat he was piloting . . . ." We believe the presence of a light on the Shore Arm Extension might have prevented the accident, and hence the failure to provide such light might have been a cause of the accident.

harbor through the gap, traveling at approximately 30-35 miles per hour. Just before he cleared the breakwater, he swerved to the left and collided with the Shore Arm Extension 20 feet from its eastern end. Presumably Bearce believed he had cleared the breakwater when he changed course. Bearce was instantly killed in the accident and the only passenger in the boat was seriously injured. This action was originally brought by Bearce's survivors, asserting that the Government was negligent in failing to place a light on the eastern end of the Shore Arm Extension, and asserting recovery under the Suits in Admiralty Act and the Federal Tort Claims Act.

At trial, evidence was presented that the Illinois Boating Council had held public hearings attended by the Coast Guard in 1966 concerning the navigational aids needed in the gap. The Coast Guard's report after the hearing noted that the color of the light on the exterior breakwater should be changed from white to green and that a red flashing light should be placed on the end of the Shore Arm Extension. The Coast Guard never acted on the second recommendation, but did change the color of the existing light so that it would be distinguishable from the lights of the city. On the night of May 10, this light was working properly.

The district court entered a judgment for the United States based, *inter alia*, upon a holding that the Federal Government had not waived its sovereign immunity under the Suits in Admiralty Act in matters involving discretionary functions.[2] The court did not rule on the Federal Tort Claims Act claim. We affirm.

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[2] The district court held that:

> "The United States owed no duty to plaintiffs or to the public in general to establish an aid to navigation at any particular place or to establish a particular type of aid at any given location. The establishment and placement of aids to navigation is a discretionary function vested in the United States Coast Guard by Congress. 14 U.S.C. § 81; *Gercey v. United States*, 540 F.2d 536 (1st Cir. 1976), *cert. denied*, 430 U.S. 954 (1977)."

I.

The plaintiffs' actions properly arise under the Suits in Admiralty Act, 46 U.S.C. § 742, *et seq.*[3] *United States v. Continental Tuna Corp.*, 425 U.S. 164, 176 n. 14 (1976); *Chapman v. United States*, 575 F.2d 147 (7th Cir.), *cert. denied*, 439 U.S. 893 (1978). The Suits in Admiralty Act (SIAA) was originally enacted in 1920 as a waiver of sovereign immunity in cases arising out of claims involving United States vessels and cargo. In 1960 the statute was amended to eliminate a variety of jurisdictional problems by bringing all maritime claims against the United States under the admiralty jurisdiction of the federal courts. *United States v. United Continental Tuna Corp., supra* at 172-78. One of the results of the 1960 amendments was to remove maritime claims such as the ones at bar from the coverage of the Federal Tort Claims Act (FTCA).[4] However, when the SIAA was amended, the exceptions to the FTCA's waiver of sovereign immunity set out in 28 U.S.C. § 2680 were not restated in the SIAA. Thus, if the exceptions expressed in 28 U.S.C. § 2680 are not implied in suits under the SIAA, the 1960 amendments to the SIAA will have served not only to eliminate jurisdictional difficulties but also to extend the waiver of sovereign immunity in the area of maritime law. This court must determine whether the 1960 amendments to the SIAA were intended to eliminate the discretionary function exception to the waiver of sovereign immunity expressed in the FTCA or whether this exception should be implied into the SIAA.

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[3] 46 U.S.C. § 742 states in pertinent part:

> "In cases where . . . if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States."

[4] The FTCA has an exemption for all cases covered by the SIAA. 28 U.S.C. § 2680(d).

The discretionary function exception is one of the exceptions provided in the FTCA, 28 U.S.C. § 2680(a).[5] The question of whether the discretionary function exception should be implied in the SIAA has been litigated in several circuits, producing a conflict between the First Circuit and the Fourth and Fifth Circuits. The Fourth and Fifth Circuits have refused to imply the discretionary function exception, arguing that Congress should cure the statute if the waiver of sovereign immunity is too extensive. *Lane v. United States*, 529 F.2d 175, 179 (4th Cir. 1975);[6] *De Bardeleben Marine Corp. v. United States*, 451 F.2d 140, 146 & n. 15 (5th Cir. 1971) (dictum). The First Circuit has adopted the opposite position and has implied a discretionary function exception in the SIAA, *Gercey v. United States*, 540 F.2d 536, 539 (1st Cir. 1976), *cert. denied*, 430 U.S. 954 (1977). On this record, we agree with the reasoning of the First Circuit in the *Gercey* case.

In *Gercey, supra* at 539, the First Circuit persuasively explained its position as follows:

> "Unlike the Federal Tort Claims Act, *see* 28 U.S.C. § 2680(a), the Suits in Admiralty Act does not contain an express exception for harm caused by the exercise of 'discretionary functions,' a category which includes, and probably should be limited to,

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[5] "§ 2680. Exceptions

"The provisions of this chapter and section 1346(b) of this title shall not apply to—

"(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."

[6] The *Lane* case involved damage caused by a barge previously sunk and unmarked of which the United States officials were aware. Other acts of Congress, such as the Wreck Acts, 14 U.S.C. § 86, 33 U.S.C. §§ 409, 414, which are not relevant here, were pertinent in that case.

basic 'policy judgments as to the public interest.' *See Griffin v. United States*, 500 F.2d 1059, 1064 (3d Cir. 1974); K. Davis, Administrative Law Treatise § 25.08 (1976 Supp.). Although the Suits in Admiralty Act contains no express exception, we think that sound principles demand that the act be construed as subject to such discretionary function exception. *See* K. Davis, *supra*, § 25.13 (1958 ed. & 1970 Supp.); L. Jaffe, Judicial Control of Administrative Action, 244 n. 43 (1965). *Compare King v. Seattle*, 84 Wash.2d 239, 525 P.2d 228 (1974). Were there no such immunity for basic policy making decisions, all administrative and legislative decisions concerning the public interest in maritime matters would be subject to independent judicial review in the not unlikely event that the implementation of those policy judgments were to cause private injuries. That, in our view, would be an intolerable state of affairs, *see United States v. Sandra & Dennis Fishing Co.*, 372 F.2d 189, 195 (1st Cir. 1967), and we decline, in the absence of an express Congressional directive to the contrary, to construe this waiver of sovereign immunity as providing the federal courts with that power." (Footnote omitted.)

The First Circuit's conclusion is further buttressed by the Supreme Court's opinion in *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 176 (1976), where the Court noted that the 1960 amendments to the SIAA were intended to eliminate jurisdictional problems. The Court held that, in light of this limited congressional purpose, it was improper to interpret the 1960 amendments to the SIAA literally so as to effectively repeal the exceptions to the waiver of sovereign immunity included in the Public Vessels Act, 46 U.S.C. § 781, *et seq.* In light of these authorities, we hold that, on the record in this case, a discretionary function exception is implied in the Suits in Admiralty Act.

II.

The only matter remaining for this court to decide is whether the action of the Government in failing to erect a light at the eastern end of the Shore Arm Extension falls within the discretionary function exception. We have concluded that it does. The Coast Guard has been given discretionary authority to establish aids to navigation.[7] Title 14 U.S.C. § 81 states in pertinent part:

> "In order to aid navigation and to prevent disasters, collisions, and wrecks of vessels and aircraft, the Coast Guard *may* establish, maintain and operate:
>
> "(1) Aids to maritime navigation required to serve the needs of the armed forces or of the commerce of the United States, ..." (Emphasis supplied.)

In this case, the acts which plaintiffs assert constitute negligence resulted from an exercise of this statutory discretion. The leading case in determining the limits of the discretionary function exception's application to the Coast Guard's management of aids to navigation is *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), where the Government's failure to maintain the beacon in a lighthouse in proper working order was held to be unprotected by the discretionary function exception. At page 69, the Court stated that:

> "*The Coast Guard need not undertake the lighthouse service*. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the

[7] Plaintiffs assert that the Corps of Engineers is also liable for the failure to place a light on the eastern end of the Shore Arm Extension either when the breakwater was originally built or when the parapet was added in 1965. Establishing navigational aids in the Chicago harbor has been the responsibility of the Coast Guard (finding 31). In light of the Coast Guard's assumption of this responsibility in the Chicago harbor, the Corps' decision to defer to the Coast Guard in the matter of erecting navigational aids, rather than duplicating the Coast Guard's efforts, is not reviewable under the discretionary function exception to the SIAA.

> light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act." (Emphasis added.)

Similarly, in *Somerset Seafood Co. v. United States*, 193 F.2d 631, 635 (4th Cir. 1951), where the Government had placed a buoy over 500 feet from its proper location, the court stated that:

> "[E]ven if the decision to mark or remove the wreck be regarded as discretionary, there is liability for negligence in marking after the discretion has been exercised and the decision to mark has been made. There is certainly no discretion to mark a wreck in such way as to constitute a trap for the ignorant or unwary rather than a warning of danger."

In both cases the Government was liable for operational errors in the performance of routine duties: negligent maintenance of a lighthouse and negligent placement of a buoy. The courts emphasized that the injuries resulted from the breach of the non-discretionary duty to operate the aids with due care. However, the decision to establish the aid in the first instance was discretionary.

In our case the Coast Guard's aid to navigation in the gap was operating as planned. There was no operational error. Plaintiffs complain of the total absence of any mark on the Shore Arm Extension. They attempt to characterize the Coast Guard's decision to have one light at the gap as an operational error. This is unpersuasive. The decision not to build another light was made at an administrative level. The need for aids to navigation in the gap had been studied in 1966 and a report was prepared by the Coast Guard. Not all of the recommendations of the report were adopted. However, the

color of the existing flashing light was changed to make it more distinct.[8]

There was evidence that the Coast Guard has similarly decided to provide only a single light for secondary entrances to the Milwaukee and Buffalo harbors. The evidence further showed that at the time of trial the Coast Guard had a priority list of aids to navigation approved for construction totaling 300 million dollars which had not yet been funded by Congress. In view of budgetary restraints, the Coast Guard cannot implement every recommendation its regional offices may make. The allocation of funds for the construction of new aids to navigation requires policy judgments concerning the public interest, and thus is a discretionary function which courts should not review in the context of a tort claim.[9]

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[8] The green color of the light also indicated to any boat operator leaving the harbor that the light should be on his right as he left the harbor under the well recognized maxim "red right returning." See 2 Marine Law § 1317.

[9] In *Gercey v. United States*, 540 F.2d 536, 538-39, the court noted the following factors in determining the extent of the discretionary function exception:

> "[W]e note at the outset that the Coast Guard's alleged negligence lies in failing to adopt a policy of taking positive steps to protect the public from vessels whose certificates have been revoked, not in imperfectly executing a federal program established either by an act of Congress or a federal regulation. *Compare Indian Towing Co. v. United States*, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), *and Coastwise Packet Co. v. United States*, 398 F.2d 77 (1st Cir. 1968). Neither the Congress nor the Coast Guard has explicitly required that positive action be taken to protect the public from such vessels. . . . Although we agree with plaintiffs that the Coast Guard has the discretionary authority to adopt such a follow-up program, it has not done so.
>
> "The decision whether to institute such a policy, in our view, involves a basic policy judgment as to how the public interest may best be promoted. The Coast Guard has limited resources and a myriad of regulatory responsibilities. A determination whether it would be in the

(Footnote continued on following page)

The district court's order will be affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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[9] *continued*
public interest to make a major commitment of the Coast Guard's resources to the creation of a follow-up system would require consideration of a host of factors: how effective the present enforcement measures—whatever they are—have been; how much more protection would be afforded the fee paying public if such a system were created; and, finally, whether the increased protection would be sufficient to warrant both the commitment of the Coast Guard's resources and the possible diversion of such resources from other regulatory activities.

"We need not attempt to strike the balance between these perhaps competing interests. The critical question for our consideration is not whether we agree with the plaintiffs' contention that ordinary prudence requires that the Coast Guard take broad, positive measures to protect the fee paying public from decertified vessels. Rather, it is whether a federal court has the power to impose liability on the Coast Guard for failing to make, and implement, the basic policy decision that the public interest requires its limited resources be committed to such a program. We conclude that we have not been conferred that power by the Suits in Admiralty Act."

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

March 20, 1980.

Before

Hon. THOMAS E. FAIRCHILD, Chief Judge
Hon. LUTHER M. SWYGERT, Circuit Judge*
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. ROBERT A. SPRECHER, Circuit Judge
Hon. PHILIP W. TONE, Circuit Judge
Hon. WILLIAM J. BAUER, Circuit Judge
Hon. HARLINGTON WOOD, JR., Circuit Judge*
Hon. RICHARD D. CUDAHY, Circuit Judge*

MARSHALL BEARCE, Administrator of the Estate of Thomas Bearce, Deceased; AETNA INSURANCE COMPANY and LESLIE PALMER, JR.,

No. 79-1512 *v.* *Plaintiffs-Appellants,*

UNITED STATES OF AMERICA and its Subordinate Agencies, THE UNITED STATES COAST GUARD and THE UNITED STATES CORPS OF ENGINEERS,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 77-C-1628—**George N. Leighton**, *Judge.*

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* Circuit Judges Swygert, Wood and Cudahy voted to grant petition for rehearing *in banc.*

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by appellants, a vote of the active members of the Court was requested, and a majority of the active members of the Court have voted to deny a rehearing *in banc*. All of the judges on the original panel have voted to deny the petition for rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

Supreme Court, U. S.
FILED
AUG 7 1980
MICHAEL RODAK, JR., CLERK

No. 79-1961

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARSHALL BEARCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

QUESTION PRESENTED

Whether the United States may be held liable under the Suits in Admiralty Act for the Coast Guard's discretionary decision not to establish a particular aid to maritime navigation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 21a-30a) is reported at 614 F. 2d 556. The opinion of the district court (Pet. App. 1a-18a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1980. A petition for rehearing was denied on March 20, 1980 (Pet. App. 31a-32a). The petition for a writ of certiorari was filed on June 13, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

46 U.S.C. 742 provides in pertinent part:

> In cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States * * *.

STATEMENT

Petitioner Marshall Bearce is the representative of the estate of Thomas Bearce, who was killed when the pleasure boat he was operating collided with a breakwater in the Chicago Harbor on May 10, 1975.[1] In this action against the United States, brought under the Suits in

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[1]Petitioner Leslie Palmer was the owner of the boat that the decedent was operating at the time of the collision; the boat was insured by petitioner Aetna Insurance Company (Pet. App. 10a).

Admiralty Act, ch. 95, 41 Stat. 525, 46 U.S.C. 741 *et seq.*,[2] petitioners alleged that the Coast Guard negligently caused Bearce's death by failing to erect an additional aid to navigation at the site of the accident.

The accident occurred as Bearce attempted to pass through the Oak Street Gap, an opening between two of the breakwaters that form part of the Chicago Harbor. Pursuant to its authority under 14 U.S.C. 81, the Coast Guard had marked the eastern side of the gap with a flashing green light, and the area was properly charted. The edge of the breakwater on the western side of the gap, with which Bearce collided, was not lighted. Petitioners contended that the Coast Guard had a duty to erect additional aids to navigation in the area and that its failure to establish a light on the western side of the gap had caused Bearce's death.

After a trial in the United States District Court for the Northern District of Illinois, the court granted judgment for the United States (Pet. App. 1a-20a). The district court held that the government owed no duty to the public to construct an aid to navigation at any particular place. The court found that Bearce was familiar with the area and that a prudent mariner could have navigated the gap safely by using the existing light. Accordingly, the court concluded that the accident was caused solely by the negligent operation of the boat at high speed (*id.* at 16a-17a).

The court of appeals affirmed (Pet. App. 21a-30a). The court noted that the presence of another light might have prevented Bearce's accident (*id.* at 22a n.1), but concluded

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[2]Petitioners originally brought this action under 28 U.S.C. 2675 (the Federal Tort Claims Act), but amended the complaint to assert a maritime wrongful death claim under the Suits in Admiralty Act.

that in enacting the Suits in Admiralty Act Congress did not waive sovereign immunity with respect to claims such as that asserted by petitioners (*id.* at 24a-26a). The court reasoned that decisions on whether and where to construct aids to navigation involve discretionary policy judgments concerning the distribution of scarce public resources and that Congress did not intend the exercise of such judgments to give rise to tort liability under the Act (*id.* at 27a-29a).

ARGUMENT

1. Petitioners' principal contention (Pet. 8-10) is that Congress' failure to include in the Suits in Admiralty Act an explicit statement eliminating liability for governmental policy decisions must be interpreted to mean that it intended to create such liability. However, the court of appeals correctly followed the reasoning of *Gercey* v. *United States,* 540 F. 2d 536, 539 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977), in concluding that the Suits in Admiralty Act must be construed to include an exception for discretionary governmental functions.

Suits brought under the Federal Tort Claims Act are subject to an exception for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. 2680(a). For the reasons set forth in our brief in opposition to the petition for certiorari in *Gercey* v. *United States,* No. 76-807, October Term, 1976 (at 5-6),[3] there is no basis for concluding that Congress intended to remove the discretionary function exception (and, *sub silentio,* to subject the government to new tort

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[3]We are sending a copy of our brief in opposition in *Gercey* to counsel for petitioners.

liability) when it transferred certain maritime tort actions from the Federal Tort Claims Act to the Suits in Admiralty Act in 1960. Indeed, the legislative history demonstrates that the amendment was intended only to remove the confusion concerning the respective jurisdictions of the federal district courts and the Court of Claims. See also *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 175-176 (1976).[4]

Nothing has occurred since the denial of certiorari in *Gercey* to make this question worthy of review. Petitioners, as did the petitioner in *Gercey*, argue (Pet. 7-8) that review by this Court is necessary to resolve an alleged conflict among the courts of appeals, but as we explained in *Gercey* (Br. in Opp. at 7 & n.3), it is not at all clear that there is any actual conflict in result.

In the present case, the Coast Guard's decision to leave the west side of the Oak Street Gap unlighted was undoubtedly "a basic policy judgment as to how the public interest may best be promoted" (Pet. App. 29a n.9, quoting *Gercey* v. *United States, supra*, 540 F. 2d at 538). The decision whether to make additional improvements at a secondary entrance to a harbor requires a judgment as to whether the possible danger in the area is so great as to warrant the diversion of limited funds from other areas (see Pet. App. 29a).[5]

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[4]Prior to the passage of the Suits in Admiralty Act, the "discretionary function" exception had regularly been applied in Federal Tort Claims Act cases within the federal courts' admiralty jurisdiction. See, *e.g.*, *Kline* v. *United States*, 113 F. Supp. 298 (S.D. Tex. 1953); *Westchester Fire Ins. Co.* v. *Farrell's Dock & Terminal Co.*, 152 F. Supp. 97, 98 (D. Mass. 1957).

[5]The court of appeals noted (Pet. App. 29a) that the Coast Guard has recommended that large numbers of new aids to navigation be established. Congress, however, has not provided funding to implement many of those requests. As the court of appeals concluded

2. Liability in tort can be found only if the alleged tortfeasor breached a duty of care to the injured party and if the breach of duty proximately caused the injury. But as this Court has noted, Congress has not imposed on the Coast Guard a mandatory duty to establish aids to navigation. *Indian Towing Co.* v. *United States,* 350 U.S. 61, 69 (1955). See *Chute* v. *United States,* 610 F. 2d 7, 11 (1st Cir. 1979), cert. denied, No. 79-1311 (May 5, 1980). Of course, the government may be held liable for negligence if it induces reliance on a warning device and then fails to maintain it properly. *Indian Towing Co.* v. *United States, supra,* 350 U.S. at 65. But here, petitioners' only complaint is that the Coast Guard failed to *undertake* a service; under *Indian Towing* it is clear that such a complaint does not state a claim upon which relief can be granted. The mere fact that the Coast Guard had legal authority to erect navigational aids did not result in a duty to petitioners upon which a claim for damages may be founded.

3. Finally, there is no merit to petitioners' suggestion (Pet. 13-14) that the decision here conflicts with principles established in *Moragne* v. *States Marine Line,* 398 U.S. 375 (1970) and *Sea-Land Services* v. *Gaudet,* 414 U.S. 573 (1974). Those cases addressed the question whether an action for wrongful death based on unseaworthiness could be maintained under federal maritime law. The Court concluded that federal maritime law could supply a remedy for wrongful death in that situation, even though it was not specifically provided for by statute. We fail to see how *Moragne* and *Gaudet* bear on the issue at bar, especially since those cases involved only the liability of

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(*ibid.*; footnote omitted), "[t]he allocation of funds for the construction of new aids to navigation requires policy judgments concerning the public interest, and thus is a discretionary function which courts should not review in the context of a tort claim."

private parties and did not raise any issue of sovereign immunity or arise under either the Federal Tort Claims Act or the Suits in Admiralty Act.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 1980

DOJ-1980-08

Supreme Court, U.S.
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No. 79-1961

In the Supreme Court of the United States

OCTOBER TERM, 1979

MARSHALL BEARCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1961

MARSHALL BEARCE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In their petition for certiorari, petitioners contended that review in this case is necessary to resolve a conflict among the circuits on the question whether the discretionary function exception to the Federal Tort Claims Act should be implied in cases brought under the Suits in Admiralty Act. Specifically, petitioners asserted (Pet. 7, 10) that the decisions of the Seventh Circuit in this case and the First Circuit in *Gercey* v. *United States*, 540 F. 2d 536 (1976), cert. denied, 430 U.S. 954 (1977), conflict with the decisions of the Fourth Circuit in *Lane* v. *United States*, 529 F. 2d 175 (1975), and the Fifth Circuit in *De Bardeleben Marine Corp.* v. *United States*, 451 F. 2d 140 (1971). In our brief in opposition, we argued that the court of appeals correctly concluded that the Suits in Admiralty Act must be construed to include an exception for discretionary governmental functions, that any

conflict on the question was more apparent than real, and that, at all events, the government is not liable in tort because in failing to erect additional navigational aids it breached no duty of care to petitioners.

A recent decision of the United States Court of Appeals for the Fourth Circuit lends strong support to our argument that review of petitioners' claims is not warranted. In *Corros* v. *United States*, No. 78-1175 (Sept. 10, 1980),[1] the court held, on facts virtually indistinguishable from those of the instant case (see App., *infra,* 10a n.9), that even if under *Lane* the government can generally be held liable in admiralty whenever a private party would be, the government was not liable to the decedent's estate because it was under no duty to provide additional lighting or markings on a dike with which the decedent's boat collided (App., *infra,* 7a). Furthermore, the court held that the doctrine of *Indian Towing Co.* v. *United States,* 350 U.S. 61 (1955), upon which the petitioners here rely (Pet. 14-16), was inapplicable because the government "undertook only to light the channel end of the dike with a light, and at no time did it fail to perform that undertaking" (App., *infra,* 9a). In view of the decision in *Corros*, it is apparent that petitioners would have had no better chance of obtaining relief had their action arisen in the Fourth Circuit.[2] Accordingly, this case is not an appropriate one in which to resolve any conflict that may exist with regard to the applicability of the discretionary function exception to actions under the Suits in Admiralty Act.

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[1]We are reproducing the *Corros* opinion in an appendix to this memorandum.

[2]Nor is there any reason to believe that petitioners would have fared any better in the Fifth Circuit on the issue of liability.

For the foregoing reasons and the reasons stated in our brief in opposition, it is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

SEPTEMBER 1980

DOJ-1980-09

APPENDIX

United States Court of Appeals

For the Fourth Circuit

No. 78-1175

MICHAEL D. MAGNO, PLAINTIFF

v.

HELEN LOUISE BOWLING CORROS,
ADMINISTRATRIX OF THE ESTATE OF
RICHARDO ABELLO CORROS, APPELLEE

v.

THE UNITED STATES OF AMERICA, APPELLANT

EXXON CORPORATION, THIRD-PARTY DEFENDANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON
SOL BLATT, JR., DISTRICT JUDGE.

ARGUED DECEMBER 3, 1979
DECIDED SEPTEMBER 10, 1980

Before BRYAN, SENIOR CIRCUIT JUDGE
WIDENER AND MURNAGHAN, CIRCUIT JUDGES

WIDENER, Circuit Judge:

Plaintiff's[1] decedent, Richardo Corros, died of injuries received when the motorboat he was operating collided

---

[1]A passenger in the decedent's boat initially brought suit against Mrs. Corros, administratrix of the estate, for injuries received in the

with a sheet steel dike built and maintained by the United States. Plaintiff sued the United States, alleging that the government's failure properly to light the dike was the cause of the accident. After trial, the district court held the decedent 75 percent at fault for the collision and the United States 25 percent at fault. The government appeals from that judgment on the ground that it was under no duty to provide additional lighting on the dike. We agree with the government's contention and therefore reverse.

On the morning of September 29, 1973, the decedent and two passengers went fishing in the decedent's boat, a fifteen-foot, open outboard. The men launched the boat on the Cooper River at Charleston, South Carolina, and later in the day proceeded to the Wando River for fishing. The Wando and the Cooper come together south of Daniel Island.

At the completion of the day they headed toward the Cooper River, with Mr. Corros at the controls of the boat. He rounded the southern tip of Daniel Island to starboard to run northbound on the Cooper, and ran outside the marked channel taking buoys N44 and R46 to port and Daniel Island to starboard. The speed of the boat was between 29 and 39 miles per hour.

In the glove compartment of the boat was a chart of that area of the river clearly showing the dike with the light at its channel end, but Corros apparently did not use it on this occasion. Additionally, he did not use the boat's searchlight.

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accident. Mrs. Corros sought indemnity against the United States for any amount of her liability and damages for the death of her husband. The passenger ultimately settled his claim with the Corros estate, so the only issue on appeal is that of the government's liability to Mrs. Corros.

At about 8:00 p.m., in clear weather and when it was almost completely dark, the boat hit the Daniel Island Contraction Dike at a point about 280 feet shoreward from its channel end. All three men were thrown into the water and were injured. Corros died of his injuries some five days after the accident.

The Daniel Island Contraction Dike, built pursuant to Congressional authorization,[2] was completed in February 1959. Its purpose was to increase the water velocity in the Cooper River channel and reduce shoaling in the channel caused by upstream activities of the State of South Carolina. The dike is a sheet steel pile structure extending 1,100 feet to the southwest from Daniel Island. The shore end is anchored in a 100 foot long rubble mound. The channel end is anchored by a terminal cell, a sheet steel pile cylinder twenty-three feet in diameter, filled with crushed rock. At the time of the collision, the top of the dike was approximately two feet above the surface of the water, and the district court found it was not visible to an approaching boater.

At the channel end of the dike is Cooper River Dike Light 46-A, a fifteen foot high fixed tower structure supporting an all-around white light that flashes every four seconds. It is the only light to mark the dike and is designed to mark both the channel's eastern boundary and the end of the dike. Light 46-A complies with the lateral buoyage system of the United States, and correctly marks the channel and the channel user's way around the dike. The light was functioning properly at all pertinent times.

Corros, having fished in the area for several years prior to the collision, was aware of the existence and location of

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[2] River and Harbor Act of September 3, 1954, 68 Stat. 1248, amending the River and Harbor Act of October 1940, 54 Stat. 1198.

the dike and Light 46-A. After purchasing his own boat in February 1973, he fished in the area often, usually returning after dark and always going around the dike and Light 46-A.

At the time of the collision, Corros had neither of his passengers keep a lookout, although he was looking ahead from his position at the wheel. Apparently no one in the boat saw the dike until the boat was close to the point of impact. The boat hit the dike approximately head-on.

Based on these facts, the district court held that having constructed the dike, the United States undertook to mark it, and under *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), and *Lane* v. *United States*, 529 F2d 175 (4th Cir. 1975), it was required to do so in a manner so as not to abuse its discretion. The court concluded that due to the appearance and visibility of the dike in question, the United States was grossly negligent in marking it with a solitary light on the channel end, and therefore clearly abused its discretion. The court concluded that the government was 25 percent at fault for the collision and Corros 75 percent at fault. This appeal followed.

It is a familiar rule of tort law that there is no liability for negligence in the absence of a duty and breach of that duty. W. PROSSER, LAW OF TORTS §30, at 143 (4th ed. 1971). Thus, a decisive issue in this case is whether the United States was under a duty to provide additional lighting or some other type of marking on the dike as a warning to boaters in the area. Two theories are argued in support of finding that duty, both of which, however, fall short in this case.

First, plaintiff contends that 14 U.S.C. §86 applies and under *Lane* v. *United States*, 529 F2d 175 (4th Cir. 1975),

the Coast Guard abused its discretion in failing to provide additional lighting on the dike. Section 86 states in relevant part:

> The Secretary may mark for the protection of navigation any sunken vessel or other obstruction existing on the navigable waters . . . of the United States in such manner and for so long as, in his judgment, the needs of maritime navigation require. . . . This section shall not be construed so as to relieve the owner of such obstruction from the duty and responsibility suitably to mark the same and remove it as required by law. . . .

Plaintiff argues, and the district court held, that when the government undertook to mark the dike, it was so grossly negligent in the marking of it that it abused its discretion under *Lane* and was therefore subject to liability for the collision.

In *Lane* a ski boat collided with an unmarked barge that had wrecked and sunk some five years earlier. The original owner of the vessel had failed to remove it after it sunk, and under 33 U.S.C. §409[3] it was therefore treated as abandoned and thus subject to the ownership of the United States. Each of the five years after the sinking of the barge approximately eight to ten boats had run upon it. This court held that, although under §86 the

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[3]33 U.S.C. §409 states in pertinent part:

> [W]henever a vessel . . . is wrecked and sunk in a navigable channel . . ., it shall be the duty of the owner . . . to immediately mark it with a buoy or beacon during the day and a lighted lantern at night, and to maintain such marks until the sunken craft is removed or abandoned, and the . . . failure of the said owner so to do shall be unlawful; and it shall be the duty of the owner . . . to commence the immediate removal . . . and failure to do so shall be considered as an abandonment. . . .

government is under no mandatory duty to mark submerged wrecks, it must exercise its discretion responsibly and cannot "ignore submerged wrecks of which [it] is informed, or fail to mark them if they constitute real dangers to navigation." Id. at 179. The court concluded that under the Suits in Admiralty Act, 46 U.S.C. §§741 *et seq*, the United States is to be held accountable whenever a private person, in similar circumstances, would be,[4] and the clear responsibility of private owners to mark sunken vessels requires the Coast Guard to exercise "care and prudence to mark submerged wrecks which constitute substantial hazards to navigation." Id.

Lane is distinguishable for two reasons. First, we do not think 14 U.S.C. §86 applies to the present case. Even though the literal words of the statute may not limit that section to obstructions such as sunken wrecks,[5] we do not feel that it applies to the dike in the present case. The dike, although technically an obstruction in navigable waters, is in fact an aid to navigation for it was constructed in order to increase the water velocity in the Cooper River and therefore assist navigation. Of additional import is the fact that Congress authorized that the dike be constructed in the first instance. Cf. *Chute* v. *United States*, 610 F2d 7, 10-11 (1st Cir. 1979), cert.

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[4]46 U.S.C. §742 states in pertinent part:

> In cases where . . . if a private person or property were involved, a proceeding in admiralty could be maintained, any appropriate nonjury proceeding in personam may be brought against the United States. . . .

[5]Prior to 1965, 14 U.S.C. §86 referred only to marking "any sunken vessel or other similar obstruction. . . ." 14 U.S.C. §86 (1956). In 1965, the word "similar" was deleted from the section. See *Doyle* v. *United States*, 441 F. Supp. 701, 709 (D. S.C. 1977). See also Senate Report n. 688, U.S. Code Congressional and Administrative News, Vol. 2, 89th Congress, 1st Session, p. 3140.

denied, 48 L.W. 3732 (May 13, 1980) (holding 33 U.S.C. §409 inapplicable to a ship deliberately sunk for use as a bombing target). We feel that § 86 is inapplicable to a structure such as the dike in this case which was constructed for a proper governmental purpose.

Even if we assume that §86 applies to the present case, *Lane* still provides no basis for imposing liability upon the government. *Lane* held that the government can be held liable in admiralty whenever a private person would be. But to find liability there must first be found a duty violated. In *Lane* the court emphasized that Congress in 33 U.S.C. §409 had imposed upon private owners a duty to mark their sunken vessels, and that justified imposing such a duty, although discretionary, upon the government.[6] Plaintiff here has presented us with no authority and has introduced no evidence that would impose upon anyone a duty to mark the dike any more clearly than the United States did in this case. We decline to impose this even higher duty on the government. Thus, *Lane* is inapposite for it requires that a duty be found in the first instance.

Plaintiff also argues that the government in undertaking to light the dike did so in a negligent manner and under *Indian Towing Co.* v. *United States*, 350 U.S. 61 (1955), it therefore is liable for the death of Corros. An examination of *Indian Towing* demonstrates that the argument is not well taken.

Indian Towing involved a suit under the Federal Tort Claims Act, 28 U.S.C. §1346(b), for damages allegedly

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[6]Compare *Chute* v. *United States*, 610 F2d 7 (1st Cir. 1979), in which the First Circuit refused to apply §409 where a boater collided with the remains of a vessel that the Navy had intentionally scuttled for use as a bombing target. The court held §409 inapplicable to an obstruction originally placed for a proper government purpose.

caused by the negligence of the Coast Guard in the operation of a lighthouse light. The Coast Guard, which operated the lighthouse, had neglected to repair it when it quit functioning properly. Plaintiff brought suit against the United States after its tug ran aground in the area of the lighthouse. The Supreme Court, in acknowledging the "good Samaritan" rule of tort law, id. at 64-65, held:

> The Coast Guard need not undertake the lighthouse service. But once it exercised its discretion to operate a light on Chandeleur Island and engendered reliance on the guidance afforded by the light, it was obligated to use due care to make certain that the light was kept in good working order; and, if the light did become extinguished, then the Coast Guard was further obligated to use due care to discover this fact and to repair the light or give warning that it was not functioning. If the Coast Guard failed in its duty and damage was thereby caused to petitioners, the United States is liable under the Tort Claims Act.

Id. at 69.[7]

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[7]See also *Somerset Seafood Co.* v. *United States*, 193 F2d 631, 635 (4th Cir. 1951), in which the United States, in marking a wreck, had placed the buoy some 500 feet from its proper location. This court held:

> [E]ven if the decision to mark or remove the wreck be regarded as discretionary, there is liability for negligence in marking after the discretion has been exercised and the decision to mark has been made. There is certainly no discretion to mark a wreck in such a way as to constitute a trap for the ignorant or unwary rather than a warning of danger.

In the present case, there has been no showing that the single light on the dike in question is a trap for the unwary.

In the present case, the Coast Guard undertook only to light the channel end of the dike with a light, and at no time did it fail to perform that undertaking. The record is entirely void of any evidence showing that the light somehow would induce a boater to believe that there was nothing between it and land. The chart published by the government, for example, is to the contrary. Also important is the fact that the Coast Guard never undertook to provide additional lighting or markings on the dike; it therefore could never have engendered reliance on additional markings. The only undertaking of the Coast Guard was maintaining the light on the end of the dike, and the record indicates that this undertaking was performed properly.

The *Indian Towing* doctrine is therefore inapplicable to the present case, for at no time did the government exercise its discretion to lead the public or the plaintiff to believe that there was safe passage between the light and the land.

Although the limited resources of the Coast Guard may not be a decisive factor in the determination of this case, we should not be oblivious to those budgetary considerations in ascertaining whether or not there has been an abuse of discretion. Given the tremendous expense which would undoubtedly be involved in lighting all the authorized obstructions under the control of the Coast Guard,[8] in the absence of a Congressionally imposed requirement of additional marking, we feel that it is usually inappropriate for a federal court to impose such a

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[8]While the record is silent as to the number of unlighted obstructions to navigation present in the navigable waters of the United States, it does indicate that there are some 631 unlighted buoys and over 3200 unlighted beacons located in the Seventh Coast Guard District alone.

requirement and in effect direct the Coast Guard how to spend its limited resources. Every dollar of its money that we direct it spend is diverted from another regulatory activity. Cf. *Gercey* v. *United States*, 540 F2d 536, 538-39 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977).

Accordingly, the judgment of the district court is *REVERSED.*[9]

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[9]Most of the essential facts in this case are indistinguishable from those of *Bearce* v. *United States*, 614 F2d 556 (1980). The light in *Bearce* was at the end of a breakwater, and the Seventh Circuit held that the discretionary function exception to the Tort Claims Act should be implied in cases under the Suits in Admiralty Act. The First Circuit agrees with the Seventh. *Chute* v. *United States*, 610 F2d (1st Cir. 1979); *Gercey* v. *United States*, 540 F2d 536 (1st Cir. 1976). The Fifth Circuit, in *DeBardeleben Marine Corp.* v. *United States*, 451 F2d 140 (5th Cir. 1971), agrees with *Lane* of this circuit.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

MARSHALL BEARCE, Administrator of the Estate of Thomas Bearce, deceased; AETNA INSURANCE COMPANY and LESLIE PALMER, JR.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' REPLY TO THE SUPPLEMENTAL MEMORANDUM OF THE UNITED STATES

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On September 24, 1980, the Respondent, United States of America, filed a Supplemental Memorandum in opposition to the pending Petition for a Writ of Certiorari. The Supplemental Memorandum is based on the recent decision by the United States Court of Appeals for the Fourth Circuit in *Corros v. United States*, No. 78-1175 (Sept. 10, 1980). The characterization of the *Corros* decision by the United States in its Memorandum is misleading and necessitates the filing of this Reply.

I.

THE DECISION IN *CORROS v. UNITED STATES* DOES NOT ADDRESS OR DECIDE THE QUESTION OF WHETHER THE DISCRETIONARY FUNCTION EXCEPTION OF THE FEDERAL TORT CLAIMS ACT IS AN IMPLIED EXCEPTION TO THE SUITS IN ADMIRALTY ACT AND, THEREFORE, IT IS NOT RELEVANT TO THE PRIMARY ISSUE BEFORE THIS COURT.

The primary issue presented by the present Petition for a Writ of Certiorari is the important federal question of whether the "discretionary function exception" of the Federal Tort Claims Act (28 U.S.C. § 2680(a)) should be implied into the Suits in Admiralty Act (46 U.S.C. § 742 *et seq.*). In the present case and in *Gercey v. United States*, 540 F. 2d 536 (1st Cir. 1976), the Seventh and First Circuits have implied this exception into the Admiralty Act. These decisions by the First and Seventh Circuits clearly conflict with the decisions of the Fourth and Fifth Circuits in *Lane v. United States*, 529 F. 2d 175, 179 (4th Cir. 1975) and *De Bardeleban Marine Corp. v. United States*, 451 F. 2d 140, 146 & n.15 (5th Cir. 1971), which have refused to imply the "discretionary function exception" into the Suits In Admiralty Act.

In its Supplemental Memorandum, the Government contends that the decision in *Corros v. United States* supports its position in this case. This assertion is without merit. In *Corros v. United States*, the Court of Appeals did not attempt to amend or modify the Fourth Circuit's earlier holding in *Lane v. United States*, 529 F. 2d 175 (1974) that the discretionary function exception is inapplicable to the Suits In Admiralty Act. Thus, the law in the Fourth Circuit with regard to the Suits In Admiralty Act remains as enunciated in *Lane*, namely, that the discretionary function exception of the Federal

Tort Claims Act is not to be implied into the Suits In Admiralty Act. The holding in *Corros* in no way changes the force and effect of the *Lane* holding.

It is important to note that the Fourth Circuit in the *Corros* case recognized that the Fourth and Fifth Circuits remain in conflict with the First and Seventh Circuits on the question of whether the discretionary function exception should be implied into the Suits In Admiralty Act. (*See* footnote 9 of opinion). This recognition of the conflict supports the Petitioners' contention that a substantial conflict exists among the circuits on this question and, therefore, this controversy is ripe for review by this Court. Instead of supporting the Government's plea for a denial of this Petition for a Writ of Certiorari, the holding in *Corros v. United States* is another example of the confusion which now reigns on the admiralty questions presented by the Petition pending in this case. Thus, the decision in *Corros* provides an additional reason for this Court to grant the Writ of Certiorari, hear this case on the merits and define the standards applicable to the numerous similar situations pending throughout the country.

II.

THE DECISION IN *CORROS v. UNITED STATES* ILLUSTRATES THE CONFLICT IN THE CIRCUITS OVER THE DEFINITION OF A "DISCRETIONARY FUNCTION" WITHIN THE MEANING OF THE UNITED STATES SUPREME COURT DECISION IN *INDIAN TOWING CO. v. UNITED STATES*, 350 U.S. 61 (1955).

In the decisions in *Bearce v. United States* and *Corros v. United States*, the Seventh and Fourth Circuits have held that the Coast Guard has no duty to design its lights and navigational aid systems in a careful manner. This holding is in conflict with the decisions in the

Fifth, Sixth and Ninth Circuits which have recognized that the Government is liable for negligent design decisions and for its failure to warn citizens of dangers in areas under Government control. *See Seaboard Coast Line R.R. Co. v. United States*, 473 F. 2d 714 (5th Cir. 1973); *United States v. State of Washington*, 351 F. 2d 913, 916-17 (9th Cir. 1965); *El Paso Natural Gas Co. v. United States*, 343 F. 2d 145 (9th Cir. 1965) and *Dye v. United States*, 210 F. 2d 123, 128 (6th Cir. 1954). The Supreme Court should now take this opportunity to resolve this conflict. Moreover, this Court should hold that the Government is liable for its negligence when it fails to carefully warn its citizens of imminent dangers created and controlled by the Government.

If this Court holds the "discretionary function exception" applicable to Suits In Admiralty Act cases, this Court should resolve the continuing conflict which now exists on the proper definition of the "discretionary function exception". *See* Section VI of the Petitioners' Petition for a Writ of Certiorari. The failure of this Court to clearly define this issue will leave the District Courts in a quandary over the proper standard to be applied in all Federal Tort Claims Act and Suits In Admiralty Act cases pending throughout the country. The District Courts need the Supreme Court's guidance on this question and, therefore, it is important for this Court to grant this Petition for a Writ of Certiorari. In addition, the boating public needs this Court's intervention to clearly establish the Coast Guard's duty to establish adequate lighting and marking facilities to prevent the continuing tragedies which are occurring on our waterways.

CONCLUSION

For these additional reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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